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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

163

ANTHONY ORLANDO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MELVIN B. LEWIS
30 North LaSalle Street
Chicago 2, Illinois
Attorney for Petitioner

The Scheffer Press, Inc. ANdover 3-6850

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TEXT.

Illinois Bar Journal, January 1964, Vol. 52 No. 5 p. 443 14-15

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To The

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Anthony Orlando, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit, hereinafter set forth.

JUDGMENT AND OPINION OF THE COURT BELOW.

On January 30, 1964, the United States Court of Appeals for the Sixth Circuit affirmed a judgment of the United States District Court for the Eastern District of Kentucky, denying petitioner's motion to vacate an earlier criminal judgment against him, which motion

was filed pursuant to Section 2255, Title 28, United States Code. The opinion of the Court of Appeals is reported at 327 F. 2d 185, and is reprinted as Appendix "A" to this Petition.

JURISDICTIONAL STATEMENT.

Petitioner filed a motion in the United States District Court for the Eastern District of Kentucky, seeking to vacate a judgment heretofore entered against him in a criminal case in that court. The motion was filed in pursuance of Section 2255, Title 28, United States Code. The motion was denied by the District Court.

On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment was affirmed by an opinion filed January 30, 1964.

A petition for rehearing was timely filed, and was denied on March 3, 1964.

On June 1, 1964, Mr. Justice STEWART entered an order extending the time for filing this petition, to and including June 8, 1964.

The jurisdiction of this court is invoked under the provisions of Section 1254 (1) and Section 2101 (c), Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW.

1. Do the standards set forth in *Townsend* v. *Sain*, 372 U.S. 293, governing the right to an evidentiary hearing for a petitioner in a federal habeas corpus proceeding challenging the validity of a state criminal conviction, also apply to a petitioner who attacks the validity of a federal criminal judgment under Title 28 U.S. Code, Section 2255?

2. May a District Court properly refuse to entertain a petition filed under Title 28 U.S. Code, Section 2255, if that petition sets forth grounds which would clearly entitle the petitioner to a hearing if the contested judgment had been entered in a State court?

3. Where, by motion under Title 28 U.S. Code, Section 2255, a federal prisoner makes representations which constitute a prima facie showing that the sentence imposed upon him constitutes the denial to him of due process of law, and

Where said prisoner's allegations relate to matters dehors the files and records of the case in which sentence was imposed, then,

May a District Court summarily deny said motion without hearing evidence?

4. Where a motion under Title 28 U.S. Code § 2255 recites that the allegations thereof will be supported by the testimony of two named lawyers practicing before the court in which the petition is filed, one of whom was the prosecutor at the time of movant's conviction,

May a District Court summarily deny such a motion without calling for any expression from the lawyers thus named?

5. Where a federal prisoner files a motion under Title 28 U.S. Code § 2255 seeking to set aside the judgment of conviction against him on the grounds that said judgment is the product of the denial to him of due process of law, and his motion is summarily denied without hearing, and said movant thereupon files a second and more detailed motion, then,

May the District Court refuse to entertain the second motion, solely upon the grounds that it is a "second or successive motion" within the meaning of 28 U.S.C. 2255; or,

Is a "second or successive motion" under 28 U.S.C. Section 2255 barred only where a prisoner has had some form of hearing on his original motion?

STATUTE INVOLVED.

Title 28 United States Code, Section 2255, is as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall dis-

charge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT OF THE CASE.

(The notation A-a and A-b refer to Petitioner's and Government's respective appendicies in the court below; the notation R— refers to the record from that court; the notation "Appendix" refers to this petition.)

In November of 1958, petitioner was charged with the crimes of bank robbery and conspiracy to commit bank robbery. On March 13, 1959, petitioner pleaded guilty, and received a sentence of 25 years on the bank robbery charge. A five year sentence was imposed on the conspiracy charge, to run concurrently with the robbery sentence. (A. 10a). On October 15, 1962, the petitioner

filed in the sentencing court his motion, *pro se*, seeking to vacate the judgment of conviction or to reduce his sentence to a term of not more than 15 years (A. Supp. 1A). This motion alleged that his plea of guilty had been induced by the United States Attorney's promise that he would not receive a sentence in excess of fifteen years if he would so plead, and that otherwise he would receive a sentence of 30 years. The motion also complained of the denial to petitioner of a transcript of the record in his case, the alleged failure of the court to permit petitioner "to say anything personally either before or after sentence was imposed," the denial of a continuance, and the alleged prejudice resulting to petitioner from "the write-ups in the papers." (A. Supp. 2A-3A).

A week later, the District Court entered an order stating that a review of the record, including a transcript of the arraignment and sentence, had shown the defendant's motion to be entirely without merit. The motion was thereupon denied (A 5A).

On December 14, 1962, the petitioner "tendered" a second petition, which was filed December 21, 1962. (A. 7A). Within this motion, the petitioner averred that prior to trial, his lawyer had advised him that he had made "a deal or agreement" with the United States Attorney, whereby it had been arranged that if petitioner would plead guilty, his sentence would not exceed 15 years. Petitioner further stated in his motion that he had agreed to plead guilty on the condition that his sentence not exceed 15 years, and that he had a valid defense which he was "forced to forsake." He further stated that his decision "to take the best deal I could get" was also motivated "by the implied promise" of the United States Attorney that if petitioner forced the

government to trial, "that every effort would be made and all influence exerted to obtain a maximum penalty." (A. 11A-13A).

Within that motion, petitioner named four persons who, he alleged, would testify in support of his allegations. Two of these were co-defendants of petitioner.[1] The other two witnesses thus named were the United States Attorney at the time of petitioner's conviction, and the lawyer who had then represented him (A. 11a). Petitioner's second motion was denied ten days after its filing; and without hearing or other proceedings (A. 17A). The District Court further filed a memorandum, stating that the denial of that motion was grounded upon the fact that an earlier motion had been presented, setting forth substantially the same facts, and that the District Court was thereby relieved of the necessity of considering a second motion. (A15a-16a).

Petitioner appealed this denial to the United States Court of Appeals for the Sixth Circuit. That court affirmed the denial. *United States* v. *Orlando*, 327 F.2d 185, Appendix A. The opinion noted that at the time of sentencing, petitioner had admitted his guilt, and that prior to sentencing, petitioner had been asked whether he had anything further to say following his lawyer's plea in mitigation, and replied in the negative. The Court of Appeals commented on the lack of detail in Petitioner's motion, and his failure to disclose the identity of two of the six witnesses to whom he referred. The opinion also stated that the two attorneys named by petitioner could not "on the record before us be considered by the Court as witnesses favorable to the appellant." Charac-

[1] The defendants were incarcerated in three separate institutions. (A.11a, 15a).

terizing his allegations as "vague, conclusory, or palpably incredible", the Court of Appeals affirmed the judgment.

Petitioner's lawyer died suddenly in the course of oral argument of the case in the Court of Appeals. (R. 2) On the rendition of the opinion above referred to, Petitioner filed *pro se* a petition for rehearing in the Court of Appeals. This petition averred factually that the two unnamed witnesses were relatives of the co-defendant Brinegar, whose actual names were unknown to Petitioner, but who had been present in the prosecutor's office and had heard the promise made. The petition was verified "under penalty of perjury." (R. 7-8) On March 3, 1964, the Court of Appeals entered an order denying the Petition. (R. 12)

BASIS OF FEDERAL JURISDICTION.

Petitioner, being confined in the custody of the Attorney General of the United States pursuant to a judgment of conviction entered by a United States District Court, commenced the proceedings below in said District Court by motion under Title 28 U.S. Code, § 2255.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner has duly alleged that his plea of guilty was induced by a promise of leniency, and that in reliance upon that promise, he elected to plead guilty although he had "a valid defense" to the charge against him. (A. 12a, 13a) Even if the sufficiency of the "valid defense" be questioned, there can be no question that Petitioner had a legal and a moral right to plead not guilty and to force the government to prove its case beyond a reasonable doubt. This right, perhaps the bedrock of all civil rights, was certainly waived by petitioner. He alleges,

without direct contradiction, that he surrendered this right in exchange for a promise that his sentence would not exceed fifteen years.

Petitioner's allegations have been disregarded in a summary manner, notwithstanding that the record contains neither a refutation nor a competent denial of his allegations.

At the time petitioner was sentenced, the United States Attorney in the sentencing district was Mr. Henry Cook (A. 11a, 1b). When petitioner's motion under Section 2255 was filed in the sentencing court, Mr. Bernard T. Moynahan, Jr. had succeeded to that office (A. 3a). Mr. Moynahan had not participated in the original proceedings (A. 1b).

Petitioner's first motion alleged, *inter alia*, that he had been "induced" to plead guilty by the prosecutor's promise that he would not receive a sentence in excess of 15 years, which promise was relayed through his court-appointed counsel. (A. Supplement 2a). This allegation was generally denied in a "response" filed by the government and signed by an Assistant United States Attorney (A. 3a, 4a) who had also not participated in the original proceedings (A. 1b). The government's response also stated that petitioner's motion "is composed only of vague, indefinite general charges." (A. 4a). The motion was denied on the basis of the record and without hearing (A. 5a, 2a).

About six weeks later, petitioner, still acting pro se, filed his second motion (A. 7a). His allegations this time were detailed (A. 8a-13a). He stated that his contentions would be supported by six witnesses, including two co-defendants, his court-appointed attorney, *and the prosecutor at the time of his sentencing* (A. 11a). He also

stated that he would "furnish two additional witnesses that are not named above", in addition to his own testimony (A. 11a). The record shows no response to the second motion. It was denied ten days after it was filed (A. 17a), on the grounds that Section 2255 did not require that a second motion be entertained (A. 16a).

Petitioner engaged counsel and appealed. The Court of Appeals affirmed "for the reason given by the District Judge". (Appendix A, page 5a). The court commented that petitioner had not presented affidavits from his witnesses, setting out what they would testify if called (A. 1, page 4a). The opinion further commented that the defendant had relied "in part upon two witnesses whose names he does not even disclose." (A. 7a).

Petitioner's counsel had died during the pendency of the appeal (R. 2). On the rendition of the opinion, Petitioner, again proceeding pro se, filed his petition for rehearing, stating that the names of the two unnamed witnesses were unknown to him, but that they were a sister and brother-in-law of one of his co-defendants, who had heard Mr. Cook make the alleged promise (R. 7). He further stated that his three and one-half year delay in presenting his petition had been due to the fact that he had been unaware what legal steps to take (R. 8).

The government filed a response to the petition for rehearing (R. 10-11) stating that the "circumstances indicate" that the petition was false because it was very unlikely that the petitioner would have been brought to the United States Attorney's office. It may be noted that this response wrongly quotes the Petitioner as contending that Mr. Cook's promise was made in Petitioner's presence (R. 10). The petition for rehearing was denied (R. 12) and by this petition for writ of certiorari petitioner seeks this court's review.

An extended citation of authorities in support of the Petitioner's position is frankly deemed unnecessary in view of this court's holding in *Sanders* v. *United States*, 1963, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed. 2d 148. The *Sanders* opinion might well serve as Petitioner's brief here. It is so completely irreconcilable with the opinion here presented for review, that it may fairly be termed remarkable that both opinions are products of the same system of jurisprudence.

In fact, such factual differences as exist to distinguish *Sanders* from the case at bar, all run in Petitioner's favor. Sanders, in his second motion, set forth matters which might well be said to have been known to him at the time of the filing of his first motion, but not contained therein. Contrast Petitioner's situation. In all his motions and petitions, he has consistently contended that his plea had been motivated by a promise of a fifteen year sentence.

This Court's recognition, as expressed in *Sanders*, that an inartistic pro se petition filed by a prisoner is likely to require revision and amendment before reaching its final actionable form, has not been extended to petitioner by the courts below. Petitioner's first motion was rejected after the government had termed it a composite "only of vague, indefinite general charges." (A. 4a). Petitioner with reasonable promptness filed a second motion not susceptible of that criticism, but the second motion was denied because it was a second motion. His appeal was rejected on the same grounds, but with certain further observations worthy of notice.

The Court of Appeals pointed out that Petitioner had not named two of his witnesses (Appendix A, 7a). The Petitioner promptly replied that he did not know their names, but furnished a description and relationship of

sufficient definiteness as to make it completely certain that the identity of the witnesses could be determined readily and beyond any question (R. 7).

The opinion disparaged Petitioner's co-defendants as witnesses, stating that their "credibility is such as to give little, if any weight to what they might say." (Appendix A. 7a) This, we suppose, may loosely be said of any federal prisoner, but it seems a very unsound basis for rejecting in advance any statements with which such a person might make. We strongly doubt that the law is prepared to assume that the credibility of any federal prisoner is necessarily "slight", so that the writ of habeas corpus ad testificandum may as well be abolished.

Finally, the opinion states that the two lawyers named as witnesses by the Petitioner "obviously cannot on the record before us be considered by the court as witnesses favorable to [Petitioner]." (Appendix A. 7a). On the contrary—on the record before the Court of Appeals, the testimony of those lawyers *must* be considered favorable to Petitioner. The Court of Appeals complains that Petitioner did not append their affidavits. But Petitioner is a prisoner in a federal penitentiary, and it is very doubtful that he has any means of obtaining any such affidavit, or that he had any awareness of the necessity of his doing so, even if such necessity in fact exists. As your Honors said in *Sanders*, "An applicant for such relief ought not to be held to the niceties of lawyer's pleadings." 10 L.Ed. 2d 165.

If in fact the two lawyers named, including the prosecutor at the time of conviction, were prepared to refute the Petitioner's contentions, it would seem much more probable that the United States Attorney might have

obtained their affidavits. Both lawyers are presumably still practicing before the sentencing court. The case at bar demonstrates amply the wisdom of this Court's expression in *Sanders*, that "the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a *second or* successive motion." 10 L. Ed. 2d 165. The testimony of the lawyers in question was readily available to the government and to the sentencing court. Having failed to call for any expression from them, it seems astounding that the government can become the beneficiary of a presumption that those witnesses were unfavorable to the Petitioner.

It is worthy of more than passing notice that the Petitioner, as a federal prisoner, did not receive in the lower courts the consideration that would have been mandatory had he been a state prisoner. In *Townsend v. Sain*, 372 U.S. 293, 313, 9 L. Ed. 2d 770, 786, your Honors stated certain criteria, the presence of any one of which elements will entitle a state prisoner, petitioning for habeas corpus in the federal courts, to an evidentiary hearing as of right. One of those six criteria—newly discovered evidence—has no application here. But each and all of the other five are present in the case at bar.

If the Petitioner here had been a State prisoner, and had received within the courts of his State treatment similar to that accorded him in the District Court, Federal relief would have been granted him as a matter of course under the *Townsend* decision. For Petitioner can show, conclusively, that, in the language of *Townsend*:

1. "The merits of the factual dispute were not resolved in the [state] hearing"—in fact, there was not even an attempt to do so.

2. "The [state] factual determination is not fairly supported by the record as a whole"—there is neither a "record" in the usual sense, nor even a factual determination.

3. "The fact-finding procedure employed by the [state] court was not adequate to afford a full and fair hearing"—the procedure was simplified to the point of complete unconstraint; it was simply abandoned.

4. "The material facts were not adequately developed at the [state] court hearing," for the compelling reason that no hearing was held.

5. "The [state] trier of fact did not afford the [habeas] applicant a full and fair fact hearing"—or, indeed, any other kind of hearing.

It would be anomalous indeed to state that a claim of deprivation of constitutional right in a State court is entitled to more serious consideration than the same claim arising out of Federal proceedings. Yet, that is the net effect of a comparison of *Townsend* v. *Sain* with the opinion here presented for review.

The Petitioner presented in the District court a simple claim, readily determinable. The District court has told him, in effect, that it cannot be bothered with such a matter. The Court of Appeals has told him, in effect, that the District court is very busy, and besides, Petitioner is probably lying, as Federal prisoners (as opposed to State prisoners) are, in its view, presumed to do.

We grant that the District court has many demands upon its time. But this Court has

> ". . . treated such considerations as secondary in light of the goal it sought to achieve, i.e., insuring the right of all state prisoners to contest detention contrary to the Constitution and laws of the United States . . .

(T)his right to be heard must be preserved and safeguarded at all costs." Illinois Bar Journal, January 1964, Vol. 52 No. 5, p. 443.

And, *a fortiori*, the safeguard extends to Federal prisoners. This is the lesson of *Sanders*.

The scales of justice simply cannot balance a very few hours of the District court's time, against ten years of the Petitioner's life.

CONCLUSION.

There is no just reason for denying to Petitioner a hearing upon the merits of his claim.

If the Petitioner's claim is untruthful, it will not be burdensome to the District court to determine that fact. If his claim is truthful, a great injustice has been done.

In these circumstances, it is lamentable that Petitioner must seek the attention of this Court. But seek it he must; he is without any practical alternative.

We pray that your Honors will not withhold relief. Granting it will do much to assure that this Court need not again be called upon in such a matter, and that Federal prisoners will receive a reasonable hearing on their proper claims at an appropriate stage of proceedings.

Respectfully submitted,

MELVIN B. LEWIS,
Attorney for Petitioner

APPENDIX "A".

No. 15304

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY ORLANDO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Kentucky.

Decided January 30, 1964.

Before: MILLER and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

MILLER, Circuit Judge. This is an appeal from a judgment of the District Court overruling appellant's motion to vacate judgment, filed pursuant to Section 2255, Title 28, United States Code.

Appellant Orlando and three codefendants, Jalove, Brinegar and Thornton, were charged in a two-count indictment with (1) conspiring to rob the Farmers Bank of Petersburg, Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation, and (2) the substantive offense of robbing said bank, in violation of Sections 371 and 2113, Title 18, United States Code, respectively.

Appellant and Jalove were represented by the same counsel of their own choosing. The District Judge appointed other attorneys to separately represent Brinegar and Thornton, at their request. On January 19, 1959,

the defendants, with counsel present, entered pleas of not guilty to both counts of the indictment and the case was set for trial on March 11, 1959. On March 11, 1959, a jury was regularly impaneled, accepted and duly sworn. At that time counsel for appellant and Jalove stated to the Court that said defendants desired to withdraw their prior pleas of not guilty and substitute pleas of guilty. Upon inquiry directed to each of them by the Court, each defendant confirmed their counsel's statement and entered a plea of guilty to both counts of the indictment. The Court inquired of the two defendants if they were doing this under their free will, and specifically asked, "You are entering your plea of guilty to these charges because you are guilty of them, is that right?" The defendants answered, "Yes, sir." The trial proceeded against Brinegar and Thornton.

On March 12, 1959, appellant and Jalove filed motions to withdraw their pleas of guilty and enter pleas of not guilty.

On March 13, 1959, after the jury retired to consider the case against Brinegar and Thornton, the Court, with appellant and Jalove present, heard counsel on these motions. Counsel stated that the two defendants, after discussing the matter very carefully with him "felt that without any question they were guilty of the charge in Count 2," and that they were admitting that they were the ones who robbed the bank, but that they did not feel that they actually engaged in a conspiracy as such for the purpose of robbing the bank, in that they did not plan it out in advance. He stated that they preferred to stand on the plea of guilty to robbing the bank and enter a plea of not guilty to the conspiracy charge. In answer to questions directed to them by the Court, each defendant stated that he wanted to stand on his guilty plea to the charge of robbing the bank. This was followed by a discussion between the Court, the defendant Jalove, and the United States Attorney attempting to explain to the defendants what constituted a conspiracy;

following which both defendants stated that they were pleading guilty to both counts of the indictment. Their counsel then withdrew their motions to withdraw their pleas of guilty.

The jury returned a verdict of guilty against Brinegar and Thornton.

At the sentencing of the four defendants, the Court asked appellant and his attorney if they had anything to say before judgment was pronounced. Appellant's attorney reviewed to the Court appellant's background and record, which showed that he had three long sentences in Illinois prisons, two short sentences in the house of correction in Chicago, that he was a product of an environment problem and characterized as a "bad character," that by reason of inability to obtain employment he had fallen in with poor companions and had been led into a life of crime, that appellant was "beyond the point where we can hope that anything may correct him," that "After we studied it over very carefully, we decided the only thing for him to do would be to enter his plea of guilty to the charge and to throw himself upon the mercy of the court," and that the appellant had done the decent thing by pleading guilty and admitting freely and frankly to the Court what his situation was, of which the Court should take cognizance in dealing with the case. The appellant, in answer to the Court's inquiry, "Do you have anything further you want to say, Anthony?" replied, "No, sir."

The Court imposed a sentence of five years on the first count of the indictment and twenty-five years on the second count, the sentences to run concurrently.

On October 15, 1962, appellant filed a motion to vacate the twenty-five year sentence or to reduce it to not more than fifteen years on the ground that he was induced to plead guilty by his counsel, who informed him that if he would plead guilty the United States Attorney had guaranteed that he would not receive a sentence in ex-

cess of fifteen years, but unless he was willing to plead guilty he would receive a sentence of thirty years. He also relied on the following additional grounds which were either clearly refuted by the record or were without merit, namely, (1) he was not afforded an opportunity to say anything personally either before or after sentence was imposed, (2) he was denied a continuance for the purpose of employing other counsel, (3) that his motion for change of venue was improperly denied, and (4) that his motion for a transcript of the record was improperly denied.

The motion was denied by the District Judge on October 23, 1962, without a hearing, upon a consideration of the record, including a transcript of the arraignment and sentence, on the ground that the motion was "entirely without merit." No appeal was taken from this order, although such was available to him under the provisions of Section 2255, Title 28, United States Code.

On December 21, 1962, appellant filed the present motion to vacate the sentence or to correct it to a term of not more than fifteen years, on the ground that the plea of guilty was induced and entered through misrepresentation and as the result of an agreement between his attorney and the United States Attorney that if he would plead guilty the maximum sentence which would be imposed would not exceed fifteen years, and that he agreed to accept the proposal on this condition only. The motion alleges that his plea of guilty was void as a matter of law and that the conviction and sentence resting thereon is repugnant to the 5th, 6th and 14th Amendments to the United States Constitution, and asked for a hearing.

The motion states that appellant can substantiate his allegations by four named witnesses, namely: his codefendants Jalove and Brinegar, the United States Attorney, and his own attorney, and by two unnamed additional witnesses. Appellant did not file or tender a statement or affidavit of any of these six persons, setting out what said person would testify if called as a witness.

On December 31, 1962, the District Judge filed a Memorandum which stated that by the express provisions of Section 2255, Title 28, United States Code, the Court is not required to consider a second motion for similar relief under that section on behalf of the same prisoner and that in his opinion the present motion proceeds from grounds that were pressed on the earlier motion. On the same day an order was entered overruling the motion, from which the present appeal was taken.

Appellant contends that his motion raised a factual issue with respect to the alleged agreement between his attorney and the United States Attorney by reason of which he was illegally induced to enter the plea of guilty and that under the rulings in *United States* v. *Hayman*, 342 U.S. 205, *Machibroda* v. *United States*, 368 U.S. 487, *Teller* v. *United States*, 263 F (2) 871, C. A. 6th, and *Motley* v. *United States*, 230 F(2) 110, C. A. 5th, he was entitled to a hearing on this factual issue.

We are of the opinion that the judgment should be affirmed for the reason given by the District Judge. *Section 2255, Title 28, United States Code; Howard* v. *United States*, 199 F(2) 276, C. A. 8th. The issue presented to the Court by the present motion was previously considered by the District Judge and found by him to be "entirely without merit." No appeal was taken from that ruling. Although this is not legally res judicata, we find, under the circumstances of this case, no abuse of discretion on the part of the District Judge in declining to consider for the second time an issue previously considered and ruled upon by him. Section 2255 expressly relieves him of the requirement to do so. *Bent* v. *United States*, 308 F(2) 585, C. A. 8th, cert. denied, 373 U. S. 917, rehearing denied, 374 U. S. 818; *Dann* v. *United States*, 234 F(2) 219, C. A. 6th, cert. denied, 352 U. S. 899; *Malone* v. *United States*, 299 F(2) 254, 256, C. A. 6th, cert. denied, 371 U. S. 863; *Moore* v. *United States*, 278 F(2) 459, C. A. D. C.; *Daniels* v. *United States*, 258 F(2) 356, C. A. 9th; *Corcoran* v. *United States*, 231 F(2) 449, 451, 452, C. A. 7th; *Wells* v. *United*

States, 210 F(2) 112, C. A. 5th; *Birtch* v. *United States*, 173 F(2) 316, C. A. 4th, cert. denied, 337 U. S. 944.

In addition, we are of the opinion that the factual issue claimed by the appellant to exist in this case does not have the necessary substance to require the District Judge to hold a hearing. As was recognized by the Supreme Court in *Machibroda* v. *United States*, supra, 368 U. S. 487, 495-496, it does not automatically follow that a petitioner is entitled to a full hearing on a factual issue raised by his motion, no matter how vague, conclusory or palpably incredible his allegations may be, and that the statute does not strip the district courts of all discretion to exercise their common sense. In that case, petitioner's allegations were supported by a detailed affidavit giving specific information about when and where the alleged agreement was entered into and other material information relative thereto. The Court apparently gave considerable weight to these "specific and detailed factual assertions of the petitioner." (p. 496.) In the present case we do not have such specific and detailed allegations.

In considering this question it must be noticed that although appellant was sentenced on March 13, 1959, he did not file his first motion to vacate or reduce the sentence until October 15, 1962, some three and one-half years later. There is no explanation for this delay. Incidentally, this was some eight months after the opinion was handed down in the *Machibroda* case on February 19, 1962, in which the basis of the motion to vacate is substantially the same as the one alleged by appellant in the present case. No reason is suggested by appellant, and none appears to exist, why the United States Attorney would make such an agreement. Proof of appellant's guilt was apparently beyond question. The four defendants were arrested within a few hours after the robbery, and appellant had $2,170.00 of the stolen money on his person when caught. When the guilty plea was entered the appellant expressly acknowledged to the Court that it was voluntary and entered because he was guilty of the charge. See: *United States* v. *Davis*, 319 F(2) 482, C. A. 6th.

Appellant relies in part upon two witnesses whose names he does not even disclose, two codefendants, whose credibility is such as to give little, if any, weight to what they might say in favor of appellant's claim, and the two attorneys in the case, who, obviously, can not on the record before us be considered by the Court as witnesses favorable to the appellant. Not only are we not advised of what these witnesses would testify to specifically, but such allegations by the appellant would in the present state of the record be purely hearsay. In our opinion, the allegations of the motion are, in the language used in *Machibroda*, supra, vague, conclusory, or palpably incredible, and as such, do not raise a bona fide factual issue upon which a hearing must be held. *Johnson* v. *United States*, 239 F(2) 698, C. A. 6th, cert. denied, 354 U. S. 940; *O'Malley* v. *United States*, 285 F(2) 733, 735, C.A. 6th; *United States* v. *Thomas*, 291 F(2) 478, 480, C. A. 6th, and cases therein cited. See also: *United States* v. *Davis*, supra, 319 F(2) 482, C. A. 6th.

The judgment is affirmed.

APPENDIX "B".

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

(Caption—No. 15304)

March 3, 1964

The petition for rehearing of the Appellant, Anthony Orlando, having been considered by the Court, it is ordered, that said petition for rehearing be denied.